

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

October 31, 2002

GSBCA 15862-RELO

In the Matter of CID H. MORGAN

Cid H. Morgan, Saugus, CA, Claimant.

Melinda C. Rollo, Director, Financial Management, United States Forest Service, Pacific Southwest Region, Vallejo, CA, appearing for Department of Agriculture.

NEILL, Board Judge.

Claimant, Mr. Cid H. Morgan, a district ranger in the United States Forest Service, has asked us to review his agency's decision denying his request for authorization of an additional thirty days of allowance for temporary quarters subsistence expenses (TQSE). We conclude that the reason given for denying the request is no longer supported by the applicable provision of the Federal Travel Regulation (FTR). Nevertheless, because the decision to extend authorized TQSE is a matter left to agency discretion, we return this matter to the agency for whatever action it deems appropriate in accordance with this decision.

Background

On January 5, 2002, Mr. Morgan began occupancy of temporary quarters at his new permanent duty station in California. As part of his permanent change of station move from Indiana, he had been authorized sixty days of TQSE. Well before moving into temporary quarters near his new duty station, Mr. Morgan contracted with a local broker at his old duty station for the marketing and sale of his residence there. The broker proved to be less than satisfactory. She ceased showing the property after December 2001. She likewise stopped advertising the property in the local paper and rejected Mr. Morgan's request that she advertise in surrounding areas.

In early February 2002, Mr. Morgan conferred with the agency's local travel coordinator regarding the problems he was having with his agent. He explained that he could not make an offer on a home near his new duty station until he had sold his prior residence in Indiana. The coordinator suggested that he request an additional thirty days for his TQSE and allegedly expressed the view that there would be no problem in having the request approved. Acting on this advice, Mr. Morgan submitted a written request for extension on February 11, 2001.

Shortly thereafter, on February 15, Mr. Morgan flew back to Indiana to see if he could resolve matters with his agent. He met with no success. He then discussed his problem with an official at the local real estate board and with an attorney in the area. Since Mr. Morgan's contract with the agent was due to expire on April 11, these individuals saw little value in attempting to take action against her at this late juncture. They recommended instead that Mr. Morgan simply let his contract with the realtor expire and then retain a more reliable agent.

On return from Indiana, Mr. Morgan again submitted a written request for a thirty day extension of TQSE. He later determined that his request for an extension had not been forwarded to the agency's regional office for action until March 14 -- after the original sixty days of authorized TQSE had expired. On March 25, the regional travel coordinator advised Mr. Morgan that mere failure to sell one's house at the prior duty station was not considered a sufficient reason to extend TQSE for an additional thirty days. This coordinator, however, suggested that Mr. Morgan supplement his request with details regarding the difficulties he had encountered with his realtor and the steps he had taken in an effort to resolve them. The coordinator allegedly was of the opinion that information regarding these circumstances would facilitate approval of Mr. Morgan's request.

Mr Morgan promptly provided the information as suggested. By letter dated April 5, 2002, the regional office informed Mr. Morgan that his request was denied. In this letter, an agency official explained that the denial was based upon section 302-5.2(a)(2) of the FTR and on Chapter 302, Part 302-5-2(a)(2)(iv) of the agency's own travel regulation. Attached to the letter were two decisions of the Comptroller General, each of which concludes that a request for an extension of TQSE based upon facts similar to those alleged by Mr. Morgan in his own request should not be granted. Mr. Morgan has requested that we review the agency's denial of his request.

Discussion

On examining the grounds given by the agency in its letter to Mr. Morgan denying his request, we conclude that the agency evaluated his request applying an incorrect standard. The FTR provision cited has been revised, and the two decisions of the Comptroller General relied upon primarily speak to a part of that provision which was deleted with that revision. Furthermore, we find that the agency's own regulation which was also cited to Mr. Morgan is in conflict with the FTR provision as revised and, therefore, not good law.

____ The FTR provision cited by the agency in its letter of April 5, 2002, was, in fact, replaced effective March 21, 1997. Prior to that date, the provision stated that TQSE could be extended beyond the original authorized sixty days provided the agency head or his/her designee determined that there are compelling reasons for continuing occupancy of temporary quarters. The same provision required, however, that to qualify for this extension,

an employee must demonstrate that the extension was required "due to circumstances which have occurred during the initial 60-day period of occupancy and which are determined to be beyond the employee's control and acceptable to the agency." 41 CFR 302-5.2(a)(2) (1996) (FTR 302-5.2(a)(2)). This provision, as revised, was found, at the time Mr. Morgan moved, in FTR 302-5.105. For purposes of our discussion here, the revised provision differs principally from the earlier version in that it no longer requires the employee to demonstrate that the requested extension is due to circumstances which arose during the initial sixty-day period of authorized temporary quarters. Instead, a "compelling reason" for granting a requested extension is now defined simply as "an event that is beyond your control and is acceptable to your agency" 41 CFR 302-5.105 (2001). This provision is now found at 41 CFR 302-6.105 (66 Fed. Reg. 58,194, 58,217-18 (Nov. 20, 2001)).

The agency's letter to Mr. Morgan refers him to two decisions of the Comptroller General, our predecessor in settling relocation and travel claims of civilian employees of the Federal Government, namely: Blanch Brown, B-260580 (Nov. 13, 1995), and Michael F. Locke, B-221751 (July 11, 1985). In both these decisions, the Comptroller General concluded that the request for an extension of TQSE should be denied because the circumstances given in support of each request had not occurred during the initial sixty-day period of authorized temporary quarters. Rather, they were deemed attributable to the poor housing market conditions at the old duty station, which already existed at the time of the employee's transfer. With the deletion of the requirement that a request for extension be attributable to circumstances occurring during the initial sixty-day period, reliance on these two decisions to deny a request is misplaced. In addition, both of these decisions turn primarily on the prior existence of poor market conditions, while the facts recited by claimant in this case indicate a distinctly different set of circumstances which rendered it difficult, if not impossible, to sell his home in a timely fashion regardless of prevailing market conditions.

The agency's own regulation, which was also cited to Mr. Morgan by the official denying the request for extension of temporary quarters, sets out various circumstances which are not deemed to be compelling reasons for granting an extension of TQSE beyond the first sixty-day period. The specific provision cited by the agency reads: "Inability, for whatever reason, to sell residence does not by itself justify this extension." We find this provision unduly restrictive and in conflict with the applicable FTR provision as revised. Under the FTR, as revised, a "compelling reason" for extending TQSE beyond the first sixty-day period need only be an event demonstrated to be beyond the employee's control and acceptable to the employee's agency. It is not reasonable for the agency to conclude *a priori* that under no circumstance can inability to sell one's residence ever qualify as a compelling reason for extending TQSE beyond the first sixty days.

We have in the past recognized that inability to sell a residence is not, by itself, *necessarily* a compelling reason for an extension of TQSE. A homeowner generally has some control over his ability to sell his residence. See Ralph M. Martinez, GSBCA 14654-RELO, 98-2 BCA ¶ 30,105 (and cases cited therein). However, this is not to say that the inability to sell one's residence may not, under certain circumstances, be legitimately adjudged to be a compelling reason for extending TQSE. We have, for example, recognized that there may be conditions under which a sudden change in the real estate market at an employee's old duty station would constitute a compelling reason for extending the TQSE

period. Id. Indeed, the inability to sell one's residence may not even be related to market conditions but, as in the instant case, involve a different set of circumstances over which the employee may be determined to have no control. In short, we expect that when an individual cites the inability to sell his or her residence at the old duty station as the reason for extending TQSE, the agency will examine the facts particular to that request before deciding whether the reason given is or is not compelling.

When asked, as we have been in this case, to review agency rulings on requests for TQSE extensions, we have repeatedly stated that, on matters such as these which are entrusted to the discretion of agency officials, we will not overturn their determinations unless we find them to have been arbitrary, capricious, or contrary to law. Nora L. Donohue, GSBCA 15687-RELO, 02-1 BCA ¶ 31,780; John E. Joneikis, GSBCA 15455-RELO, 01-2 BCA ¶ 31,514; Arnot Berresford, GSBCA 15054-RELO, 00-1 BCA ¶ 30,647 (1999); Audrey J. Shegog, GSBCA 14621-RELO, 98-2 BCA ¶ 30,049; Rifat A. Ajjuri, GSBCA 14506-RELO, 98-2 BCA ¶ 29,788; Daniel A. Rishe, GSBCA 14444-RELO, 98-1 BCA ¶ 29,677; Baron L. Hudson, GSBCA 14284-RELO, 98-1 BCA ¶ 29,527. In this case, we are overturning the agency's initial determination as contrary to regulation. Nevertheless, in doing so, we have no intention of substituting our judgment for that of the agency on the ultimate issue of whether there is an acceptable compelling reason for granting Mr. Morgan's request for an extension of his TQSE. Rather, we return the matter to the agency for reconsideration in accordance with this decision.

EDWIN B. NEILL
Board Judge